Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

SERGEANT LONNY L. CRIFFIELD, PETITIONER

*v.*

UNITED STATES OF AMERICA, RESPONDENT

**Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces**

## PETITION FOR WRIT OF CERTIORARI

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April 1998

26 pp

## QUESTION PRESENTED

Whether the military erroneously denied petitioner's motion to dismiss Specification 2 of Additional Charge II because this specification was multiplicious for findings with other specifications of this charge.

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The Petitioner, Sergeant Lonny L. Criffield, respectfully prays, that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 3 February 1998.

## OPINIONS BELOW

The order and the judgment of the United States Court of Appeals for the Armed Forces is reported at 47 M.J. 419 (1998). The opinion is located at Appendix A. The opinion of the United States Air Force Court of Criminal Appeals, ACM 31687 (A.F.Ct.Crim.App., 1 July 1996) is located at Appendix B.

## JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 3 February 1998. The jurisdiction of this Court is invoked under 28 U.S.C. section 1259(3) (West Supp. 1996) and 10 U.S.C.A. §867(a)(3) (West Supp. 1996).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in relevant part: . . . nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb. . . .

## STATEMENT OF THE CASE

On 7 November 1994 and 12, 14–15 and 20–22 December 1994, the petitioner was tried by a general court-martial at Shaw Air Force Base, South Carolina. He was convicted of stealing tools, military property, of a value of less than $100.00; conspiracy to make, possess, and transfer a

silencer; making a silencer without filing an application for registration; possession of a silencer without the firearm being registered to him; transferring a silencer without first filing an application with the Secretary of the Treasury; violation of a lawful general regulation by wrongfully making one firearm silencer and attempting to make two additional firearm silencers with U.S. Government owned equipment and materials in violation of Articles 121, 81, 134 and 92, Uniform Code of Military Justice, 10 U.S.C. sections 921, 881, 934 and 892, respectively. According to Prosecution Exhibit 1, the petitioner's sworn statement, the petitioner engaged in an endeavor over several weeks between May and June 1993 that led to most of the allegations made against him. In late May or June 1993, a character named Mickey told the petitioner and Airman Hayes that if they could make a silencer for a gun, Mickey would buy it. The petitioner and Hayes' first effort was not successful. Mickey pressured them to succeed, so they tried to make a silencer with a different caliber gun. The petitioner and Airman Hayes succeeded in making a six-inch silencer that would work on a .22 caliber gun. They sold the silencer to Mickey around the middle of June 1993 for $500.00, which they split evenly. *See* Prosecution Exhibit 1.

In a classic case of "piling on," the government charged the petitioner with five separate crimes for this single transaction: (1) conspiracy with Airman Hayes to make, possess, and transfer a silencer; (2) making a silencer; (3) possessing a silencer; (4) transferring a silencer; and (5) making, possessing, and transferring a silencer with government equipment and materials in violation of a regulation.

Before entry of pleas, the trial defense counsel moved to dismiss Specification 2 of Additional Charge II because it was multiplicious for findings and sentencing with Specification 3

of the same charge. R. 190-193; Appellate Exhibit XIX. The defense's contention was that petitioner possessed the silencer only for the purpose of transferring it to another person. Therefore, the possession was an integral part of the same act or transaction of transferring it:

> MJ: I guess what defense counsel is looking at though is that even if *Teters* and *Foster* and all these cases, the—there is an interest in justice not to unfairly multiply the charges and in doing so make a defendant appear bad simply because what was one charge is separated in sixteen components of the charge and is that my understanding of what defense counsel is saying?
>
> DC: Yes, your Honor. As an offer of proof essentially the item or the equipment that was made was made sort of on a dare, "We bet you can't do it." **It was made for purpose of the transfer. As soon as it was completed, after it was tested perhaps, but the whole point in having it was to complete the transfer.** This would be akin to charging the old classic example of the individual blows of an assault. **Essentially you cannot complete the transfer without the possession and to break that into two charges is multiplicious and more fundamentally it goes down to the fundamental issue of double jeopardy.**

R. 192. Emphasis added. The military judge denied the defense motion to dismiss:

> MJ: Okay. The—this is a complex area of the law. There is a number of federal cases that talk about the intent of Congress in having various portions of a prohibited act not being the subject of a number of charges. However, I find here that the possession, if

> the making is on-base and the transfer was sometime later off-base, that I'm going to not dismiss. **I deny your motion because I'm going to allow the government for contingencies of proof to proceed on this basis.** There appears to be ample reason for doing it, but I do understand, defense counsel, this is a complex area of the law. This is not an easy area. So, okay, your motion is denied.

R. 193. Emphasis added.

The vigilant trial defense counsel renewed her motion to dismiss on multiplicity grounds after the prosecution presented its evidence, but before findings:

> DC: Yes, your Honor, we would like to renew our motion that you dismiss Specification—forgive me, I'm not doing well this afternoon. Specification as to possession. I believe that would be Specification 2 of the Additional Charge, multiplicious for findings with Specification 1 and 2 **inasmuch as there has been no evidence indicating that there was any period of possession independent of that necessary to affect transfer.**

The military judge responded in a rather puzzling manner that seemed to agree with the defense counsel's theory on the one hand, yet ruled for the prosecution on the other:

> MJ: Okay, and again, I disagree with the defense counsel's interpretation and deny the motion because I find that there is evidence that—of possession at the time of making and possession—**that the court members could find that he possessed both on-base and off-base at the time of the transfers as well as the time that he was in**

> **the shop when the item was made.** So that's a question that the court members may decide, but I am denying your motion.

R. 557. Emphasis added.

After the members convicted the petitioner of the contested allegations, the trial defense counsel moved for sentence multiplicity relief and stood on her original brief where she contended Specification 2 (possess a silencer) was multiplicious with Specification 3 (transfer a silencer) of Additional Charge II. The third time was a charm, in part, because the military judge granted some relief:

> MJ: Okay. Alright, I find that Additional Charge III, violation of the UCMJ, Article 92, is multiplicious for sentencing purposes with Additional Charge II and it's specifications. **I also find that Specification 1 and Specification 2 of Charge—Additional Charge II are multiplicious for sentencing purposes.** So then Additional Charge II then would be a DD, twenty years, total forfeitures, E–1 and the possibility of a fine…

R. 628. Emphasis added.

Finally, after hearing all the evidence, findings arguments, and sentencing arguments, the military judge revealed his ultimate multiplicity logic when he instructed the court members during sentencing:

> The finding as to Specification 1 and 2 of Additional Charge II and the Specification of Additional Charge III are such that **the accused stands guilty of offenses which are not separate for the purposes of punishment because each is part of what is essentially one transaction.** Therefore in determining what would be an appropriate sentence in this case, **you must consider the fact that in**

> **essence you're dealing with only two offenses with respect to Additional Charge II and its three specifications** and Additional Charge III and its specification rather than four offenses since they are multiplicious for sentencing consideration.

R. 722. Emphasis added.

## REASONS FOR GRANTING THE PETITION

**The military judge erroneously denied petitioner's motion to dismiss Specification 2 of Additional Charge II because this specification was multiplicious for findings with other specifications of this charge.**

Once more, the government has "piled on" the charges in an attempt to impose greater punishment upon an accused. As the military judge found, the possession of the silencer specification was multiplicious with the making and transferring specifications of the Additional Charge II because it was all part of the same transaction. The military judge had a duty to dismiss the possession specification before the end of trial.

The petitioner was prosecuted, in part, under the National Firearms Act, 26 U.S.C. §§ 5801 *et seq.*, pursuant to Article 134, Clause 3. The National Firearms Act, at least in military court-martial practice, is a rather obscure portion of the Internal Revenue Service tax code. Specifically, petitioner was prosecuted for violating 26 U.S.C. § 5861, which provides "[i]t shall be unlawful for any person—

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or

(e) to transfer a firearm in violation of the provisions of this chapter; or

(f) to make a firearm in violation of the provisions of this chapter;

The definition of "firearm" under this statute includes "any silencer." See 26 U.S.C. § 5845(a)(7).

Multiplicity is based on the double jeopardy clause, which provides a person should not be convicted twice for the same offense. *United States v. Teters,* 37 M.J. 370 (C.M.A. 1993). The first step in multiplicity analysis is to determine Congressional intent "concerning multiple convictions at a single trial for different statutory violations arising out of the same act or transaction." *Id.* at 376. If there is no "overt expression" of Congressional intent, the Court must then apply the "elements test" to determine if offenses are multiplicious:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

*Id.* at 377, citing *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182 (1932).

Did Congress intend for the petitioner to be convicted for making, possessing, and transferring the same silencer, when the military judge found "each is part of what is essentially one transaction?" R. 722. Petitioner found no "overt expression" of Congressional intent concerning multiple convictions for the same act or transaction in the National Firearms Act. Therefore, analysis of the elements is in order.

The rule of statutory construction from *Blockburger, supra,* is that offenses are not multiplicious when proof of each requires proof of an additional fact not required to be proved for the other. In petitioner's case, it is easy to see the

alleged illegal possession of the silencer was multiplicious with **either** the alleged making or transfer of the same silencer. The elements of the offense of possessing the silencer, as provided to the members by the military judge (R. 602), require proof of no additional fact needed to prove the elements of making the silencer (R. 598–599) or the elements of transferring the silencer (606). Naturally, the petitioner had to possess the silencer when he made it, and he had to possess it when he transferred it to Mickey. As a result, possession of the silencer, under the facts and circumstances, was multiplicious with the offenses of making and transferring the silencer and should have been dismissed as requested by the defense.

Furthermore, as appellee eventually conceded in their brief to the Air Force Court, as did the military judge, the petitioner's possession of the silencer was simultaneous with the transfer:

> Petitioner's simultaneous possession of the silencer is a lesser included offense of transferring the silencer to a third party. *Schmuck v. United States,* 489 U.S. 705 (1989); *Ball v. United States,* 470 U.S. 856 (1985); *United States v. Burton,* 629 F.2d 975 (1980). The elements of the possession charge are included within the elements of the transfer offense. The proper remedy is not only to hold the offenses multiplicious for sentencing, but also to dismiss the lesser offense.

Appellee Brief before A.F.Ct. Crim. App. at p. 21.

We couldn't agree more. *See United States v. Zubko,* 18 M.J. 378, 382–86 (C.M.A. 1984)(Applying *Blockburger* analysis, the Court of Appeals for the Armed Forces concluded possession of marijuana was a lesser included offense of, and multiplicious with, the offense of distribution

of marijuana). *See also Ball v. United States,* 470 U.S. 858, 862 (1985)(Applying *Blockburger,* Supreme Court held "it is clear that Congress did not intend to subject felons to two convictions; proof of illegal receipt of a firearm *necessarily* includes proof of illegal possession of that weapon" and therefore those offenses were multiplicious)(emphasis in original).

Although the defense counsel contended the possession of the silencer was multiplicious with the transfer, the military judge concluded the possession offense was multiplicious with the making. The military judge then should have done what the defense asked all along: dismiss the multiplicious possession offense. The judge did not cure the glaring pleading defect by simply declaring the offenses were multiplicious for sentencing. This issue was recently addressed by the Air Force Court of Criminal Appeals in *United States v. Dolbow,* 44 M.J. 814 (A.F.Ct.Crim.App. 1996), *pet. denied,* __ M.J. __ (No. 97–0233 23 Apr 97):

> In this case, we remind military judges that if offenses are separate for findings, they are separate for sentencing; likewise, if they merge for sentencing, they merge for findings. R.C.M. 1003(c)(1)(C); *United States v. Morrison, 41 M.J.* 482 (1995); *United States v. Lenoir,* 39 M.J. 751 (A.F.C.M.R. 1994), *pet. denied,* 40 M.J. 276 (C.M.A. 1994). Thus, a military judge should not conclude that offenses are multiplicious, that is but one offense, for sentencing unless the judge first determines they are multiplicious for findings, in which case, the judge should either consolidate or dismiss any multiplicious offense before the trial ends.
>
> * * * * *

> The converse is also true; if offenses merge for sentencing, they merge for findings. Consequently, trial judges do not short-stop an appellate issue when they grant relief for sentencing without tackling the real issue of multiplicity for findings, which often requires an in-depth look at the facts, case law, and even legislative intent.

*Id.* at 814–815.

The military judge conducted an "in-depth look at the facts" and eventually concluded the possession of the silencer was a multiplicious offense. He erred by not dismissing the possession specification before the end of trial as requested twice by the defense counsel.

Even assuming purely for argument's sake this Court finds the possession offense is not multiplicious with either the making or transfer offenses, the Court should still find the government engaged in unreasonable multiplication of charges and dismiss the improper possession specification in the name of fundamental fairness. "*United States v. Teters,* notwithstanding, military judges must still exercise sound judgment to ensure that imaginative prosecutors do not needlessly 'pile on' charges against a military accused. A fair result remains not only the objective, but indeed the justification of the military justice system." *United States v. Foster,* 40 M.J. 140, 144 n. 4 (C.M.A. 1994). The principle prohibiting unreasonable multiplication of charges was confirmed in *United States v. Morrison, supra:*

> Our holding should not be read as carte blanche for unreasonable multiplication of charges by creative drafting. *See e.g., United States v .Martin,* 36 M.J. 315 (C.M.A. 1993)(error to charge simultaneous theft of currency and of ATM card from same victim as separate offenses); *United States v.*

> *Langford,* 946 F.2d 798 (11th Cir. 1991)(error to charge single sale of stock involving 3 separate mailings as 3 separate offenses), *cert. denied,* 503 U.S. 960, 112 S.Ct. 1562, 118 L.Ed.2d 209 (1992); *United States v. Dixon,* 921 f.2d 194, 196 (8th Cir. 1990)(error to charge possession of 2 packages of cocaine at same time and place as separate offenses) We reiterate our admonition in *United States v. Foster,* [citation omitted] that "military judges must still exercise sound judgment to ensure that imaginative prosecutors do not needlessly 'pile on' charges against a military accused."

*Morrison, supra,* at 484, note 3.

In the present case, the government took what the military judge correctly found was one transaction and unreasonably multiplied two offenses (one specification of making the silencer and one specification of transferring it) and turned them into three (making, possessing, and transferring). Now, this Honorable Court needs to turn three crimes into two.

Although such citation should no longer be necessary, we must reject any notion this petitioner was not harmed since the judge found the possession offense multiplicious for sentencing because the multiplicious conviction

> does not evaporate simply because of the concurrence of the sentence. The separate *conviction,* apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be

> used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction.... Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.

*Ball v. United States, supra,* at 865.

As the military judge ultimately concluded, the petitioner was convicted of three offenses under Additional Charge II when he should have only been convicted of two. The extra, improper conviction is punitive in itself and by no means, harmless. There must be a cost to the government in "piling on" charges to secure an improper conviction. The obvious cost is to dismiss the improper conviction, and that is what petitioner seeks.

## CONCLUSION

The possession of the silencer specification was multiplicious with the making and transferring specifications of Additional Charge II. The defense counsel properly preserved this issue for appeal by moving to dismiss the possession offense. The military judge had a duty to dismiss the possession specification before the end of trial. The judge did not cure the government's pleading error by simply finding sentence multiplicity. The extra and improper conviction is punitive and must now be dismissed. The petitioner's two convictions for one act violates the Double Jeopardy Clause of the United States Constitution.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 1998

## APPENDIX A

UNITED STATES, Appellee

v.

LONNY L. CRIFFIELD, Sergeant
U.S. Air Force, Appellant

No. 96–1149

Crim.App. No. 31687

United States Court of Appeals for the Armed Forces

Argued October 8, 1997

Decided February 3, 1998

Counsel

For Appellant: *Major Margo Stone Newton* (argued); *Lieutenant Colonel Kim L. Sheffield* and *Major Gerald R. Bruce* (on brief); *Colonel Jay L. Cohen, Colonel Douglas H. Kohrt and Captain Harold M. Vaught.*

For Appellee: *Lieutenant Colonel Michael J. Breslin* (argued); *Colonel Theodore J. Fink* (on brief) and *Captain Allen G. Erickson.*

Military Judge: Patrick M. Rosenow and Terry J. Woodhouse

*Per Curiam:*

Appellant alleges that his conviction for possession of a homemade silencer is multiplicious with his conviction for wrongfully making and wrongfully transporting the firearm

silencer, all charges under the assimilative crimes portion of Article 134, Uniform Code of Military Justice, 10 USC § 934, which incorporated 26 USC § 5861(d), (e) and (f).

At trial, the defense counsel moved to dismiss the specifications alleging wrongful transfer of the silencer as being multiplicious for both findings and sentencing with the specification of possession of the silencer. The military judge found that they were not multiplicious for any purpose but, instead, ruled that the specification for making the silencer was multiplicious with the specification for possession of the silencer and instructed the members that they were to consider these offenses as one for sentencing purposes. The members sentenced the appellant to a bad-conduct discharge, hard labor without confinement for 30 days, a $500.00 fine, and reduction to the lowest enlisted grade.

Although the judge was within his discretion to treat these offenses as multiplicious for sentencing, we hold that the judge did not err as a matter of law by finding that the offenses were not multiplicious for findings. See *United States v. Neblock*, 45 MJ 191, 198-99 (1996).

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

**APPENDIX B**

UNITED STATES AIR FORCE COURT OF
CRIMINAL APPEALS

UNITED STATES

v.

Sergeant LONNY L. CRIFFIELD, FR373-88-0023
United States Air Force

ACM 31687

1 July 1996

Sentence adjudged 22 December 1994 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Terry J. Woodhouse.

Approved sentence: Bad-conduct discharge, 30 days hard labor without confinement, a fine of $500.00, and reduction to E–1.

Appellate Counsel for Appellant: Colonel Jay L. Cohen and Captain Harold M. Vaught

Appellate Counsel for the United States: Colonel Jeffery T. Infelise and Captain R. Scott Howard

Before

DIXON, SCHREIER, and SENANDER
Appellate Military Judges

## OPINION OF THE COURT

SCHREIER, Senior Judge:

Pursuant to mixed pleas, appellant was convicted of stealing military tools of a value under $100.00, conspiracy to make a silencer, making possessing, and transferring a silencer without registration, and disobeying a lawful order. Articles 121, 81, 134 and 92. UCMJ, 10 U.S.C. §§ 921, 881, 934, and 892 (1994). Members sentenced him to a bad-conduct discharge, 30 days hard labor without confinement a $500.00 fine, and a reduction to E–1. Appellant alleges six errors, none of which are persuasive.

## FACTS

These charges arose out of appellant's making a silencer for a firearm at the request of a neighbor. Appellant and a coworker used government scrap metal and equipment to make a silencer while on official duty. The silencer was eventually tested and then, upon completion of the test, was transferred to the neighbor for $500.

The National Firearms Act, 26 U.S.C § 5861 (d), (e), and (f), provides that it is unlawful for any person to make, possess, or transfer a firearm which is not registered in the National Firearms Registration and Transfer Record. The term firearm includes a silencer. 26 U.S.C. § 5845(a)(7). Prior to making, importing, or transferring a firearm, the maker, importer, or transferor shall obtain authorization which causes the registration of the firearm. 26 U.S.C. § 5841(c).

Special Agent Kinsella, Bureau of Alcohol, tobacco, and Firearms, testified that he searched the appropriate records and found no evidence of appellant ever registering a silencer. He also testified that an individual first obtain a license to make a firearm or silencer. Then, the item is actually registered after manufacture. A person who makes a silencer

without a license could not subsequently register it. This latter testimony prompted defense counsel to move for a finding of not guilty on the specifications alleging the possession and transfer of the silencer and to request an instruction on the affirmative defense of impossibility. The military judge denied the motion and refused to give the requested instruction.

POSSESSING AND TRANSFERRING A SILENCER

Appellant alleges four errors involving his convictions on the two specifications alleging that he possessed and transferred a silencer without registering it. The underlying premise of his argument is that he can not be convicted for a failure to register the possession of transfer of the silencer when such registration is impossible because the silencer was made illegally. Appellant relies primarily on the *Dalton* case which held that it was a due process violation to convict an individual of both processing and transferring an unregistered machine gun as registration was precluded by law. *United States v. Dalton,* 960 F 2d 121, 123–34 (10th Cir. 1992), *cert. denied,* 114 S.Ct. 253 (1993).

We find that the opinion in *Dalton* is not controlling in this case. First, this case involves a silencer, not a machine gun. There is no similar provision in federal law prohibiting the possession of s silencer manufactured after 1986. Next, we find that there is no conflict between the two statutes. The requirements of the National Firearms Act to register certain firearms have not been overridden by the Gun Control Act. We will now apply this analysis to appellant's specific assignment of error.

Appellant alleges that the Fifth Amendment right to due process precludes his conviction for possessing and transferring the silencer under the circumstances of this case.

As previously indicated, we find that the decision in *Dalton* is not controlling. The statue clearly prohibits making, possessing, and transferring an unregistered silencer. Each offense is separate and distinct. We find nothing in the Gun Control Act to preclude appellant's conviction of the three offenses. There was no due process violation.

We further reject appellant's argument that he was entitled to an instruction on the affirmative defense of legal impossibility because Mr. Kinsella testified that you could not register a silencer that lacked a serial number. In effect, appellant is attempting to use his own misconduct in failing to register the making of the silencer as an excuse for failing to register the possession or transfer of the silencer. An affirmative defense of impossibility is not available when the appellant's own misconduct produces the impossibility. *United States v. Guzman,* 10 C.M.R. 174 (A.B.M.R. 1953).

Appellant asserts that the military judge erred in not granted his motion for a finding of not guilty on the specifications alleging possession and transfer of an unregistered silencer. He claims that the testimony of Mr. Kinsella indicated that is was impossible for appellant to register the silencer when he did not have the license to make it in the first place.

A motion for a finding of not guilty should only be granted in the absence of some evidence which could reasonable tend to establish all the essential elements of the charged offense. R.C.M. 917(d). Mr. Kinsella testified that if you make, possess, or transfer a silencer it must be registered. He stated that there was no evidence appellant had registered the silencer as required. We find that there was some evidence tending to establish all essential elements of the offense. The military judge did not err in denying the motion for a finding of not guilty.

Next, appellant argues that the evidence is legally insufficient to support the findings of guilty to possessing and transferring the silencer. He supports this claim based on the alleged due process violations. See *United States v. Dalton,* 960 F.2d at 126.

The standard of review for legal sufficiency is whether a reasonable fact finder could have found all the essential elements of the offense beyond a reasonable doubt considering the evidence in the light most favorable to the prosecution. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). Appellant admitted he made and transferred the silencer, and Mr. Kinsella testified that the silencer had not been registered as required by law. We find that the evidence is legally sufficient to support appellant's conviction.

MULTIPLICITY

Appellant alleges that the military judge erred in failing to dismiss the specification alleging illegal possession as multiplicious with the specifications alleging illegal making and transfer. During trial, appellant argued that the possession and transfer specifications were multiplicious because the silencer was possessed only for the purpose of the transfer. The military judge denied the motion relying, in part, on the fact that the silencer was made on base and tested and transferred off base. However, the military judge did rule that the specifications alleging making and possession were multiplicious for sentencing.

In evaluating a claim of multiplicity, we look to whether Congress intended multiple convictions at a single trial for different statutory violations arising from the same act or course of conduct. *United States v. Teters,* 37 M.J. 370, 376 (C.M.A. 1993). There is nothing in the plain language of the statue or the legislative history which prohibits multiple

convictions. Moreover, each offense contains a separate element. We find that the offenses are not multiplicious. See *United States v. Kaplan,* 588 F.2d 71 (C.A.Md. 1978), *on rehearing,* 620 F.2d 1006; *Sipes v. United States,* 321 F.2d 174 (C.A.Mo. 1963), *cert denied,* 375 U.S. 913.

## DISQUALIFICATION OF THE STAFF JUDGE ADVOCATE

During the initial stages of this case, there were some "public confrontations" between appellant's original defense counsel and the base Staff Judge Advocate (SJA). As a result, appellant dismissed his original counsel. Lieutenant Colonel Baker, Chief, Circuit Defense Counsel, appointed herself as counsel. Together with appellant's civilian counsel, she represented appellant during the remainder of the case. Although this record does not provide extensive detail about this matter, it appears that Lieutenant Colonel Baker met with the convening authority's SJA, Colonel Swanson, to discuss the earlier problems. Additionally, there was a subsequent formal investigation into this matter.

Appellant argued that Colonel Swanson was disqualified from making post-trial recommendations in this case in this response to the SJA recommendation. Appellant claimed that Colonel Swanson had other than an official interest in the case due to his involvement in the situation between the base SJA and the original defense counsel. R.C.M. 1106(b). Appellant's support for this argument is that the SJA met with Lieutenant Colonel Baker and prepared a memo for the convening authority on the problem. The addendum took the position that Colonel Swanson's involvement was purely official.

The thrust of the R.C.M. 1106(b) prohibitions is to prevent someone with prior involvement or a personal interest

in the case from advising the convening authority. Here, the matter if the public confrontation between appellant's original defense counsel and the base SJA was totally separate from the administrative processing and review of appellant's court-martial. Moreover, the convening authority's SJA peripheral involvement in the investigation of this public confrontation does not equate to a personal involvement in the resolution of appellant's case. We find that the SJA was not disqualified from making post-trial recommendations in this case.

We conclude that the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to appellant's substantial rights occurred. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

Chief Judge DIXON and Judge SENANDER concur.

OFFICIAL

LAURA L. GREEN
Clerk of Court